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LIM AIK CHIN v. HONG LEONG BANK BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[ORIGINATING SUMMONS NO: 24NCC-46-05-2015]
18 AUGUST 2015

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COMPANY LAW: *Derivative action – Application for leave to bring action on behalf of company – Joinder of parties – Application to join defendant (bank) after filing suit – Whether applicant had locus standi to commence action on behalf of company – Whether bank improperly added as party to suit without leave of court – Whether court has discretionary power to grant leave nunc pro tunc – Condition precedent to invoke jurisdiction for court unmet – Whether application for retrospective leave a nullity – Companies Act 1965, ss. 181A & 181B(2)*

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CIVIL PROCEDURE: *Joinder of parties – Leave – Application to join defendant (bank) after filing suit – Whether applicant had locus standi to commence action on behalf of company – Whether bank improperly added as party to suit without leave of court – Whether court has discretionary power to grant leave nunc pro tunc – Condition precedent to invoke jurisdiction of court unmet – Whether application for retrospective leave a nullity – Companies Act 1965, ss. 181A & 181B(2)*

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The plaintiff was a director and minority shareholder of Peringkat Istimewa Sdn Bhd ('PISB'). The other shareholders of PISB were Pua Kim Ying and Asmady Abu Bakar. By an originating summons, the High Court had granted leave to the plaintiff under s. 181A of the Companies Act 1965 ('the Act') to commence an action in the name of PISB against one Pua Kim An, Fortuneprop Development Sdn Bhd ('Fortuneprop'), Pua Kim Ying and Asmady Abu Bakar ('the defendants'). The first defendant ('HL Bank') was then not included as a party. Pursuant to the leave obtained, PISB filed a civil suit ('suit') against the defendants. Since the first defendant had given a loan to Fortuneprop that was secured by landed properties of PISB and connected with the suit, the plaintiff caused PISB to file an application to join HL Bank as the fifth defendant in the suit. After filing its defence to PISB's claim in the suit, HL Bank applied to strike itself out by reason that (i) HL Bank was improperly added as a party to the suit without leave of court having been prior obtained; (ii) PISB did not have the *locus standi* to join HL Bank in the suit; and (iii) the plaintiff had failed to satisfy the condition precedent in s. 181B(2) of the Act in failing to give the requisite 30 days notice in writing to the directors of his intention to apply for leave. In consequence thereto, the plaintiff filed the present originating application for retrospective leave of court under s. 181A of the Act. The issue that arose for determination was whether retrospective leave could be granted.

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Held (dismissing application with costs):

(1) Section 181A(1) of the Act confers a complainant a right to bring, intervene in or defend an action on behalf of the company. It is however a qualified right and one which can only be exercised with the leave of

the court. Hence, at the time the complainant brought the action on behalf of the company, the company must already be vested with such a right by having obtained leave prior. Otherwise the company lacked *locus standi* to do so. (para 18)

(2) The words in s. 181A of the Act contemplate that leave of the court must be obtained before the bringing of the suit. This is fortified by s. 181B(3) of the Act that the suit must be commenced within 30 days from the grant of leave. The provisions in ss. 181A and 181B(3) of the Act must be strictly construed by reason that this statutorily accorded right is an exception to the general rule of the proper plaintiff or the rule in *Foss v. Harbottle*. (paras 25 & 26)

(3) There is no room for the court to grant leave *nunc pro tunc* or retrospectively. The court has no residuary discretionary power to do so. Since the suit had been commenced by PISB without the requisite *locus standi*, it was futile to grant leave retrospectively by reason that the suit brought by PISB against the first defendant was *void ab initio* for want of authority. (paras 27 & 32)

(4) The words 'shall give 30 days notice' in s. 181B(2) of the Act is a mandatory and not a directory requirement. Consequently, the application for retrospective leave was a nullity because the condition precedent to invoke the jurisdiction of the court was unmet in the first instance. As such, the retrospective leave as applied could not be granted to the plaintiff as a matter of law herein. (para 35)

Case(s) referred to:

Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia [1999] 6 CLJ 177 HC ***(dist)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Charlton v. Baber (2003) 21 ACLC 1671 ***(refd)***
Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***
Hiap-Taih Welding & Construction Sdn Bhd & Anor v. Boustead Pelita Tinjar Sdn Bhd [2014] 1 LNS 267 CA ***(refd)***
Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***
Husli Mok v. Superintendent of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***
Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***
Pilbara Iron Ltd v. Bonnoto (1994) 11 WAR 348 ***(refd)***
Re AJ Benjamin Ltd (in liquidation) (1969) 90 WN (Pt1)(NSW)107; [1969] 2 NSWR 374 ***(refd)***
Sarawak Building Supplies Sdn Bhd v. The Director of Forests & Ors [1991] 1 CLJ 373; [1991] 3 CLJ (Rep) 706 HC ***(refd)***
Saunders (A Bankrupt) [1997] Ch 60 ***(dist)***
Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***
Wong Min Bun v. Wang Min Fan & Others HCA 1985/2012 (unreported) ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(1)
Companies Act 1965, ss. 181A(1), 181B(2), (3), 226(3)

A Companies Act (Chapter 50) 2006 [Sing], s. 216A(3)
Insolvency Act 1986 [UK], s. 285(3)

Other source(s) referred to:
Black's Law Dictionary, 5th edn, p 174
Jeffery Pinsler SC, *Singapore Precedent of Pleadings*, p 315

B *For the plaintiff - VS Viswanathan (A Mariadass & Charan Jit Singh Santokh Singh with him); M/s Mariadass Lock & Ainuddin*
For the 1st defendant - Karen Lee Foong Voon (Sean Tan Tee Li with her); M/s Wong Kian Kheong

Reported by Sandra Gabriel

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JUDGMENT

Lim Chong Fong JC:

Introduction

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[1] This is an originating application for retrospective leave of court under s. 181A of the Companies Act 1965.

[2] The originating summons filed by the plaintiff is dated 28 May 2015 and the relevant affidavits for purposes of this application are as follows:

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(i) plaintiff's affidavit in support of Lim Aik Chin affirmed on 28 May 2015;

(ii) first defendant's affidavit in reply of Chan Poy Sim affirmed on 16 June 2015;

F (iii) plaintiff's affidavit in reply of Lim Aik Chin affirmed on 1 July 2015; and

(iv) first defendant's affidavit in reply (2) of Chan Poy Sim affirmed on 21 July 2015.

G **[3]** After reading the written submissions filed by the parties, I heard counsel on 10 August 2015. At the hearing, the parties consented to the suggestion that the question of whether retrospective leave can be granted as a matter of law be determined and decided as a preliminary point.

[4] Accordingly, this is my decision on the preliminary point.

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Salient Facts

[5] The plaintiff is a director and minority shareholder (20%) of Peringkat Istimewa Sdn Bhd ("PISB"). The shareholders of PISB are Pua Kim Ying (30%) and Asmady bin Abu Bakar (50%).

I **[6]** By an Originating Summons No. 24NCVC-7-03-2014 the Shah Alam High Court on 21 August 2014 granted leave to the plaintiff under s. 181A of the Companies Act 1965 to commence an action in the name of PISB

against Pua Kim An, Fortuneprop Development Sdn Bhd, Pua Kim Ying and Asmady Bin Abu Bakar. This was affirmed by the court of appeal on 11 February 2015. The first defendant was then not included as a party.

[7] Pursuant to the leave obtained, PISB on 10 September 2014 filled SAHC Civil Suit No. 22NCVC-447-09-2014 ("suit") against Pua Kim An, Fortuneprop Development Sdn Bhd, Pua Kim Ying and Asmady bin Abu Bakar.

[8] Since the first defendant has given a loan to Fortuneprop Development Sdn Bhd that is secured by landed properties of PISB and connected with the suit, the plaintiff on 14 November 2014 caused PISB to file an application to join the first defendant as the fifth defendant in the suit as well as to amend the writ and statement of claim accordingly. The application was allowed on 6 January 2015.

[9] After filing its defence to PISB's claim in the suit, the first defendant applied to strike itself out by reason that the first defendant was improperly added as a party to the suit without leave of court having been prior obtained.

[10] In consequence thereto, the plaintiff filed this originating application.

Contention Of The Parties

[11] Mr Visvanathan of counsel for the plaintiff submitted that leave of court pursuant to s. 181A of the Companies Act 1965 can be granted *nunc pro tunc*, that is to say retrospectively by relying on the proposition by Professor Jeffery Pinsler SC in his book *Singapore Precedent of Pleadings* at p. 315 on the equivalent s. 216A(3) of the Singapore Companies Act (Chapter 50) 2006 where he stated: "8.48. It has been held that leave can be obtained retrospectively." Professor Pinsler cited *Re AJ Benjamin Ltd (in liquidation) (1969)* 90 WN (Pt1)(NSW)107; [1969] 2 NSWR 374 in support in the footnote to 8.48.

[12] In addition, Mr Visvanathan submitted that in *Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia* [1999] 6 CLJ 177; [1999] 5 MLJ 321 in relation to an application under s. 226(3) of the Companies Act, leave has been granted retrospectively. In that case, Abdul Malik Ishak J (later JCA) adopted *Re AJ Benjamin Ltd (in liquidation)(supra)* and held as follows:

> There is one other interesting point that needs to be highlighted. It is this. Since the applicant had filed the Civil Suit No 22-388-1998 one day earlier before the company was ordered to be wound up, can the applicant be given leave *nunc pro tunc*? *Osborn's Concise Dictionary* (7th Ed) by Roger Bird at p 238 defines the term *nunc pro tunc* as 'now for then' and 'As when the court directs a proceeding to be dated as of an earlier date than that on which it was actually taken.' McLelland CJ in *Re Sydney Formworks Pty Ltd (In liquidation)* had to consider whether to grant leave *nunc pro tunc* to commence the action. In the body of the judgment, his Lordship said at p 560:

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> Section 218 of the Companies Act 1936-1960, is in the following terms: 'When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the Court imposes.' This section is substantially identical with s 140 of the Companies Act 1874, and s 94 of the Companies Act 1899, and these sections were substantially identical with s 87 of the Companies Act 1862 (UK), now represented by s 231 of the Companies Act 1948 (UK).
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> The first question for consideration is what effect have the provisions of s 218 upon an action which has been commenced without the leave of this court first having been obtained. Can the section be pleaded in bar to the action or is the appropriate course to make an application to the court in which the winding-up is proceeding to restrain its continuance without the leave of that court?

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And later after considering a few authorities, his Lordship continued at p 562:

> *The result of the cases on the Companies Acts which I have mentioned is that the section cannot be pleaded in bar to the action and that the court administering the liquidation may give leave, if it thinks proper to do so, to continue an action which has been commenced without leave*. This view is in keeping with what I consider to be the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that no person will get an advantage to which, under those provisions, he is not properly entitled, and to enable the court effectively to supervise all claims brought against the company which is being wound up.

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Finally, at p 564 his Lordship tersely said:

> *I am clearly of opinion that this court in the present case has jurisdiction now to make an order that will enable the action for damages against the company to continue, whether the order be couched in terms simply giving leave to continue with the action or in terms that the applicant may be at liberty nunc pro tunc to commence the action No 5812 of 1963 ...*

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Indeed if I am amenable to grant leave *nunc pro tunc* it would squarely come under prayer 3 of encl 4. In my judgment, there is no necessity to grant leave *nunc pro tunc* as the applicant had filed his Civil Suit No 22-388-1998 one day earlier before the company was wound up. There is no urgency to back date the leave since the proceedings had commenced. *In Re AJ Benjamin Ltd (In liquidation) 90 WN (Pt 1(NSW) 107; [1969] 2 NSWR 374,* **the writ was issued after the commencement of winding-up and Street J granted leave to proceed *nunc pro tunc*, which I may add was an appropriate step to take.** This was what Street J said in that case:

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> The matter for decision on the present application is whether the statutory fetter imposed by s 230 should be released so far as the applicant is concerned. That fetter is imposed by the Act in the Part which deals with the winding up of companies. Where a company

is being wound up as an insolvent company it is recognised that the legislative policy contemplates the assets of the company being taken under the control of a liquidator and administered with due regard to the rights *inter se* of the creditors of the company. Independent actions by creditors are not encouraged in a winding up. Responsibility for satisfying the rights of creditors is placed upon the liquidator. If the grant of this leave could be seen to be likely to lead to attempts on the part of the applicant to reopen anything already done in the winding up, then it is probable that if leave were to be granted it would be hedged about with conditions. Leave is not to be withheld simply and solely as a punishment: the primary consideration is the enabling of an orderly winding up. If no prejudice, procedural or substantive, will flow to those having interests in the winding up, an applicant has a strong case for gaining the leave he seeks. The wide power of the court to impose conditions will ordinarily be exercised to prevent the risk of prejudice.

In the present case the respondent is insured against the liability that the applicant seeks to propound. I see no difficulty in imposing upon the applicant the ordinary term shutting him out from proving in competition with the other creditors of the company. Indeed, his claim is not such as to be admissible to receive dividends in the winding up until all creditors have been paid in full (*Page v Commonwealth Life Assurance Society Ltd* (1935) 36 SR (NSW) 85; WN 21; this is of itself an element favouring the grant of leave. It is also relevant and admissible to recognise that the respondent is insured, because it is the hope of recovering under the insurance policy that presents the prospect of the applicant's claim being fruitful. If there were no prospect of surplus assets in the company, and no question of insurance, then that alone might well provide a reason for refusing leave to proceed with what would *ex hypothesi* be merely an empty action.

I have carefully considered, in the interests of a regular and orderly winding up, and in the interests of the creditors as a general body, the administrative concomitants of the grant of leave to the present applicant. Notwithstanding the grossness of the delay in the present case, I am of the view that the scope of the discretion is not such as to require my rejecting the application for leave to proceed. There is already authority in this court justifying the grant of leave to proceed *nunc pro tunc* (*Re Sydney Formworks Pty Ltd (In liquidation)* [1965], 82 WN (Pt 1(NSW) 558). In the present case I consider that a grant of leave *nunc pro tunc* should be made as it was in that case. (emphasis added)

[13] Finally, Mr Visvanathan referred to the English judgment of Lindsay J in *Saunders (A Bankrupt)* [1997] Ch 60 at 70 and 83 as follows in relation to leave pursuant to s. 285(3) of the Insolvency Act 1986:

To summarise the English authorities as they stood before Milmo J's decision 1982, the position was that, whilst none of the cases can be regarded as authoritative discussion on the questions involved, it could

A be seen that habitually our courts and experienced judges and counsel over a period of 100 years, and in a manner that by 1893 could be described as a practice, had chosen not to treat proceedings begun without leave as *ipso facto* nullities and that logical difficulty inherent in giving leave to commence after proceedings had already begun without that leave was neatly surmounted by giving instead leave to continue and
B taking that leave to sufficiently to sanction the further conduct of the proceedings in question ... *The legislature knows well enough how to provide that leave shall be a strict condition precedent to valid proceedings being issued and that clear words are to be used if that is to be intended, words perhaps even requiring a provision for the dismissal of the proceedings if the condition precedent is not satisfied. Without some clear language being used the provision can be taken to be directory*
C - the word used in *Rendall v. Blair*, and in Australia, used in *In re Testro Brothers Consolidated Ltd*. [1965] V.R. 18 and *In re Horsham Kyosan Engineering Co. Ltd.* [1972] V.R. 403. To the same effect is the view taken in Canada (*Whest Board v. Krupski*, 26 C.B.R. (3d) 293 and elsewhere that a want of leave is only an irregularity. (emphasis added)

D **[14]** Apposite to the plaintiff's submissions, Ms Karen Lee of counsel for the first defendant submitted the literal construction of s. 181A of the Companies Act 1965 envisages that leave must be obtained prior to the commencement of legal proceedings and leave cannot be obtained retrospectively to validate an action. In support, she relied on judgment of
E Anderson J in the Australian case of *Pilbara Iron Ltd v. Bonnoto* (1994) 11 WAR 348 at 354 and 355 in relation to the Local Government Act 1960:

On the proper construction of s. 660 the right to make an application for leave to commence an action out of time is a right to make an application for leave to commence an action not yet commenced, and the power of the court, conferred by that
F *section, to grant leave, is limited to the granting of leave to bring an action not yet brought. The court has no power under s. 660 to in some way ratify or retrospectively approve an action already begun without leave*. The power to grant leave is in its terms a power that can only be exercised prospectively. *As a matter of language and logic, it is not possible to "grant leave to bring", in the sense of commence, an action already commenced ... Questions as to the effect of orders made*
G *nunc pro tunc do not arise, in my opinion*. Even if it is too severe to say that the court should not, in action that is barred by statute, make a coercive order binding on the defendant except with the consent or acquiescence of the defendant, still *the court cannot make an order that relates back to a point in time before commencement of the action; at any rate not without clear legislative authority. If the grant of leave to bring the action can operate prospectively only, the*
H *application for leave to bring the action must be made before the issue of the writ and the order giving leave must be made before the issue of the writ. None of that can be achieved in an application made within the action by the exercise of power to make orders nunc pro tunc*. (emphasis added)

[15] Secondly Ms Lee submitted that even if the leave can be granted
I retrospectively, it cannot validate an action that is *void ab initio*, *to wit*, a suit brought without *locus standi*.

[16] Thirdly Ms Lee pointed out that the PlSB has in any event not satisfied the condition precedent in applying for leave under s. 181B of the Companies Act 1965. Thus, the application is a nullity.

Findings Of The Court

[17] This is a question of statutory interpretation and the starting point is naturally to examine into ss. 181A and 181B of the Companies Act 1965 which read as follows:

181A. Proceedings on behalf of a company

(1) A complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

(4) For the purposes of this section and sections 181B and 181E, "complainant" means:

(a) a member of a company, or a person who is entitled to be registered as member of a company;

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in case of a declared company under Part IX.

181B. Leave of court

(1) An application for leave of the Court under section 181A shall be made by originating summons and no appearance need to be entered.

(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A.

(3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

[18] As pointed out by Ms Lee, s. 181A(1) confers a complainant a right to bring, intervene in or defend an action on behalf of the company. It is however a qualified right and one which can only be exercised with the leave of court. Hence at the time the complainant brings the action on behalf of the company, the company must already be vested with such a right by prior having obtained leave. Otherwise the company lacked *locus standi* to do so.

[19] Ms Lee then focused on the word "bring" *via a vis* "an action on behalf of the company". She submitted that it refers to only the initiation of legal proceedings in a suit and a suit is brought at the time it is commenced according to the *Black's Law Dictionary*, 5th edn. at p. 174.

[20] According to her, this must be contrasted with the provision in s. 226(3) of the Companies Act 1965 which reads:

> 226. Copy of order to be lodged, etc.
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> Actions stayed on winding up order.
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> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

as well as s. 8(1) of the Bankruptcy Act 1967 which reads:

> 8. Effect of receiving order
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> (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[21] Ms Lee therefore submitted that both the aforesaid s. 226(3) and s. 8(1) use the words "shall be proceeded with" and "proceed with" respectively which necessarily connotes a meaning to continue with an action that already exists.

[22] The words in s. 181A of the Companies Act are clearly different and distinguishable. They are narrower. Accordingly, she submitted that the resultant effect is that as succinctly explained by Anderson J in *Pilbara Iron Ltd (supra).*

[23] As to the interpretation of statutes, Mohd Ghazali Yusoff FCJ said the following in the Federal Court case of *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445 at 472 [48]:

A statute is the written will of the Legislature and it is the fundamental rule of interpretation of a statute that it should be expounded according to the intent of Parliament. *The courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning*. (emphasis added)

[24] Also in the Federal Court case of *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421; [2013] 6 AMR 717, Suriyadi Halim Omar FCJ said the following at p. 432 (CLJ); pp. 724 (AMR):

In gist, when interpreting provisions in a taxing Act the intention of Parliament must be construed from the language used and for the Court to interpret it accordingly (*Cheatley v. The Queen* [1972] 127 CLR 291; *Attorney-General (Canada) v. Hallet & Carey Ltd*. [1952] AC 427; *Glaisdale in Farrell v. Alexander* [1978] AC 59; *Hatton v. Beanmont* [1977] 2 NSWLR 211). The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. In *Kamla Devi v. Takhatmal* [1964] AIR SC 859 the court remarked:

> If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

On the other hand if the words are not so explicit, then it is incumbent upon the court to undertake an exercise to seek out the purpose of Parliament, but without sacrificing justice or importing the absurd. The purposive approach is not a new concept as way back in *AG v. Carlton Bank* [1899] 2 QB 158 Lord Russel of Killowen CJ shot a salvo when he stated that all Acts ought to be construed no differently, "whether the Act to be construed relates to taxation or any other subject, *viz*. to give effect to the intention of the legislature." (emphasis added)

[25] Bearing these principles of statutory interpretation in mind, I agree with the submission of Ms Lee that the highlighted words in s. 181A of the Companies Act 1965 as framed by the Legislature contemplate that leave of the court must be obtained before the bringing of the suit. This is fortified by s. 181B(3) that the suit must be commenced within 30 days from the grant of leave.

[26] Moreover the provisions in ss. 181A and 181B(3) of the Companies Act 1965 must be strictly construed by reason that this statutorily accorded right is an exception to the general rule of the "proper plaintiff" or the rule in "*Foss v. Harbottle*". Thus in the Court of Appeal case of *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636, Hamid Embong JCA (now FCJ) said as follows at pp. 819 and 820 (CLJ); p. 646 (MLJ):

[8] ... The intention of ss 181A-181E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to

A bring a derivative action must not be given lightly (see *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character ... The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under
B s 181A of the CA are met. A low threshold of merely determining if there existed a *prima facie* case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 181A of the CA, and compliance to those statutory requirements (see *Charlton v. Baber* (2003) 21 ACLC 1671).

C [9] Section 181A of the CA should thus be restrictively applied. It curtails former members of a company from filing a derivative action under any circumstances. (emphasis added)

[27] There is consequently no room for the court here to grant leave *nunc pro tunc* or retrospectively. The court has no residuary discretionary power
D to do so unlike that in relation to suits after a winding up order or receiving order in bankruptcy has been made as seen from the highlighted words in s. 226(3) of the Companies Act 1965 and s. 8(1) of the Bankruptcy Act 1967 respectively. Hence it is my view that the cases of *Bruno Phillipe Fehrenbach (supra)* and *Saunders (supra)* cited and relied by Mr Visvananthan are readily
E distinguishable too.

[28] As to Professor Pinsler's proposition as cited by Mr Visvanathan, I observed that the provisions in the equivalent s. 216A of the Singapore Companies Act (Chapter 50) 2006 are different. They read as follows:

216A. Derivative or representative actions

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(1) In this section and section 216B:

"complainant" means:

(a) any member of a company;

G (b) the Minister, in the case of a declared company under Part IX; or

(c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

(2) Subject to subsection (3), a complainant may apply to the Court for
H leave to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the action or arbitration on behalf of the company.

(3) No action or arbitration may be brought and no intervention in any
I action or arbitration may be made under subsection (2) unless the Court is satisfied that:

(a) the complainant has given 14 days notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;

(b) the complainant is acting in good faith; and

(c) it appears to be *prima facie* in the interest of the company that the action or arbitration be brought, prosecuted, defended or discontinued.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)(a), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

(5) In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interest of justice, including (but not limited to) the following:

(a) an order authorising the complainant or any other person to control the conduct of the action or arbitration;

(b) an order giving directions for the conduct of the action or arbitration by the person so authorised; and

(c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action or arbitration.

(6) Where the action has been commenced or is brought in the State Courts, an application for leave under subsection (2) shall be made in a District Court.

This Singapore provision is distinguishable from that in s. 181A of the Companies Act 1965. The highlighted words therein plainly permit the grant of leave retrospectively.

[29] Be that as it may, Ms Lee further submitted that PlSB wrongly joined the first defendant in the suit. In other words, PlSB did not have the *locus standi* to do so at the material time because:

(i) there was no company resolution by PlSB authorising the filing of the joinder application;

(ii) there were only two directors in the company, one of which is the plaintiff and the other a defendant in the suit; and

(iii) there was lack of authority of the solicitors of PISB to make the joinder application, relying on *Sarawak Building Supplies Sdn Bhd v. The Director of Forests & Ors* [1991] 1 CLJ 373; [1991] 3 CLJ (Rep) 706; [1991] 1 MLJ 211 and *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165; [1990] 3 MLJ 239.

This does not appear to be seriously challenged by the plaintiff.

[30] Ms Lee submitted that in consequence of the absence of *locus standi*, there is substantive invalidity that renders the action brought by PISB against the first defendant in the suit *void ab initio*. Therefore leave, even if granted, cannot validate the action. In this regard, she referred to the Hong Kong unreported case of *Wong Min Bun v. Wang Min Fan & Others* HCA 1985/

2012 wherein the plaintiff commenced a derivative action as a shareholder on behalf of the company incorporated in British Virgin Island and the defendant applied to strike out the suit on the ground that the plaintiff had no *locus standi* to sue derivatively on behalf of the company. Peter Ng J said as follows:

> ... [44]. First, it was not in dispute that no leave from the BVI Court had been obtained by the Plaintiff. Second, there was no suggestion from the Plaintiff, or any authority in support, that leave from the BVI Court could be obtained retrospectively after a derivative action had long been commenced. Third, no authority has been shown to this court in support of the proposition that such retrospective leave, even if permissible under BVL law, could be obtained, not from the BVI Court, but from a HONG Kong Court, if and when the Plaintiff saw fit to apply for it in order to rectify any defects in the present action.
>
> [45]. In these circumstances, and given this Court's conclusion as to the legal position under BVI law, the Company's and 1st and 3rd Defendants' applications to strike out the Statement of Claim on the ground of *locus standi* must succeed.

[31] Again, I agree with Ms Lee's submission. In the Court of Appeal case of *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88, Ramly Ali JCA (now FCJ) said as follows at 95:

> The appellant cannot commence the action and then later, after objections raised by the respondent, apply for leave or sanction from the official assignee. The authority given by the official assignee is dated 3 March 2011, more than two years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks *locus standi* right from the time when the action was filed. Therefore the action was invalid and *void ab initio*. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and *void ab initio*:

see also *Hiap-Taih Welding & Construction Sdn Bhd & Anor v. Boustead Pelita Tinjar Sdn Bhd* [2014] 1 LNS 267; [2014] 5 MLJ 576.

[32] Since the suit has been commenced by PISB without the requisite *locus standi*, it is futile to grant leave retrospectively (even if it can be so granted) by reason that the suit brought by PISB against the first defendant is *void ab initio* for want of authority. It is trite law that the court will never grant orders in vain: see *Husli Mok v. Superintendent of Lands & Surveys & Anor* [2014] 9 CLJ 733.

[33] Finally, Ms Lee submitted that the plaintiff failed to satisfy the condition precedent in s. 181B(2) of the Companies Act 1965 in that the plaintiff has failed to give the requisite 30 days notice in writing to the directors of his intention to apply for leave. This is fatal and renders and application for leave whether prospectively or retrospectively granted a nullity by reason that the directors are not given the first opportunity to

refuse commencement of proceedings or decide which course of action to take is best interest of the company. Strict compliance to the statutory provision is required as seen in the Australian case of *Charlton v. Baber* (2003) 21 ACLC 1671 wherein Barrett J said the following at 1679:

> [31]. The terms of s. 237(2) are such that the court is compelled to grant leave if it is satisfied that all of the criteria in paras (a) to (e) have been met. If the court is not so satisfied, it must, I think refuse leave…Given, the statutory language, I do not regard the court as possessing any residual discretion in the matter.

[34] It is not disputed by the plaintiff that the requisite 30 days notice of bringing an intended action against the first defendant has not been served on the other director of PISB at all material times.

[35] In the premises, I also agree with the Ms Lee's submission here. The words "shall give 30 days notice" in s. 181B(2) are in my view couched in a strict imperative manner. In other words, it is a mandatory and not a directory requirement. Consequently this application for retrospective leave (even if it can be so granted) is a nullity because the condition precedent to invoke the jurisdiction of the court is unmet in the first instance.

Conclusion

[36] For the forgoing reasons, I am of the view that the retrospective leave as applied cannot be granted to the plaintiff as a matter of law herein.

[37] In the premises, the application is dismissed with costs of RM5,000.